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No. 07-__

IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC. AND ST. PAUL SURPLUS LINES,
Petitioners,

v.

DEVON LOUISIANA CORP. AND PETRA CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Fifth Circuit held that a contract to perform repairs on a platform permanently attached to the seabed was a maritime contract, and that an indemnity claim arising out of that work was therefore governed by maritime law. In reaching this conclusion, the court applied a test devised in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990) that looks at each item of work performed under a contract separately, and focuses in large part on the location of the incident giving rise to the indemnity claim. The Second and Ninth Circuits have held that this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) mandates a "global" approach that forecloses the notion that portions of a contract can be viewed in isolation, and requires a "conceptual" rather than a "spatial" approach to determining whether a contract is maritime.

*Did the Fifth Circuit err in applying a pre-*Kirby *test that focuses on severable portions of a contract in isolation, and in large part focuses on situs rather than on whether the subject matter of the contract is maritime commerce?*

LIST OF PARTIES

Petitioners are Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines, who are defendants in the district court suit and appellants in the interlocutory appeal at issue.

Petra Consultants, Inc. also was a defendant in the district court and appellant in the Fifth Circuit, but has not joined in this Petition. As such, Petra Consultants, Inc. is technically a "Respondent" in this Court. *See Rake v. Wade*, 508 U.S. 464, 466 n.1 (1993).

Respondent is Devon Louisiana Corporation, who was the plaintiff in the district court and appellee in the Fifth Circuit.

Four other parties were defendants in the district court, but did not participate in the interlocutory appeal in the Fifth Circuit: Gulf Fleet Marine, Inc., Abdon Callais Offshore, LLC, Continental Insurance Co., and Boston Old Colony Insurance Company.

Harry Thomas was a party to the case before it was severed into a different cause, but is not now a party to the case on appeal.

RULE 29.6
CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, counsel for the Petitioners state:

Magnolia Industrial Fabricators, Inc. is a non-governmental party to this action that does not have a parent company, and no publicly-held corporation owns ten percent or more of its stock.

St. Paul Surplus Lines is now part of the Travelers group of affiliated insurance companies, which have been consolidated as part of The Travelers Companies, Inc. The Travelers Companies, Inc. is a publicly-held corporation traded on the New York Stock Exchange.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit issued on September 13, 2007, which affirmed a judgment of the United States District Court for the Southern District of Texas, Galveston Division filed February 9, 2005.

OPINIONS BELOW

The district court's judgment was not published. Apx. at 1a-8a. The *per curiam* opinion of the Fifth

Circuit (Apx. at 9a-23a) was not designated for publication, but can be found on Westlaw at 2007 WL 2693647. The Fifth Circuit denied a petition for rehearing en banc through an unpublished order. Apx. at 24a-26a.

JURISDICTION

The court of appeals had jurisdiction over this interlocutory appeal because of 28 U.S.C. § 1292(a)(3), governing appeals from "interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." *See* Apx. at 14a-15a. The court of appeals' judgment was entered on September 13, 2007. Apx. at 9a. A timely petition for rehearing en banc was denied on October 12, 2007. Apx. at 24a. The petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This case presents a conflict between the decision of the Fifth Circuit below and decisions of the Second and Ninth Circuits regarding the proper test for determining whether a contract is a maritime contract subject to the admiralty and maritime jurisdiction of the United States courts and governed by maritime law. The Second and Ninth Circuits have held that this issue is determined by applying this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) ("*Kirby*"), and that prior jurisprudence must be reevaluated in light of that decision. Without even referring to *Kirby*, the Fifth Circuit held that the question of whether a contract for services in the offshore oil industry is a maritime contract is determined by applying the test devised in

Davis & Sons, Inc. v. Gulf Oil Corp., 919 F.2d 313 (5th Cir. 1990).

The suit arises out of an injury to an oilfield worker, Harry Thomas. Apx. at 12a. Mr. Thomas was employed by Magnolia Industrial Fabricators, Inc. ("Magnolia"). *Id.* Magnolia had entered into a "Master Service Agreement" with Devon Louisiana Corporation ("Devon"). Apx. at 11a. A Master Service Agreement is a contract between an oil company and a service contractor that sets forth the terms and conditions under which work will be done if and when the oil company needs the service contractor's services.

The Master Service Agreement between Devon and Magnolia contained a provision that required Magnolia to indemnify Devon if one of Magnolia's employees was injured and sued Devon. Apx. at 11a. It also required Magnolia to have Devon named as an additional assured on the liability policy issued by St. Paul Surplus Lines ("St. Paul"). *Id.*

Oil companies like Devon will typically have operations on land, on wells located on fixed platforms attached to the seabed of the Gulf of Mexico, and will also conduct drilling activities from mobile drilling units that are considered vessels. In recognition that some of the services that Magnolia could perform for Devon might involve maritime activities, and some might not, the Master Service Agreement contained a provision that provided that the contract "shall be governed by the General Maritime laws of the United States," but that "in the event it is ever judicially determined that the General Maritime laws of the United States are inapplicable, then this contract shall be governed by the laws of the State of Louisiana." *See* Apx. at 22a.

This suit arose out of a job that Magnolia was to do on a fixed platform used to produce hydrocarbons. Apx. at 10a-11a. The platform was permanently attached to the seabed, and as such, is considered to be "land"—that is, it is an artificial island instead of a vessel.[1] Devon directed Magnolia to send a crew to the platform to perform repairs to the platform. Apx. at 11a. While the Magnolia crew was to travel to the platform on a boat, both parties anticipated that all of the work was going to be done on the platform itself, and that no work would be done on the vessel. Apx. at 11a, 18a. However, when the boat and crew arrived at the platform, they discovered that someone had neglected to obtain a "hot work" permit, and so the welding had to be done on the deck of the boat. *Id.* Nonetheless, of the work that was completed, all the work except for welding was done on the platform. Apx. at 4a.

Mr. Thomas was injured on the boat while putting away equipment. Apx. at 12a. He sued Devon and other parties. *Id.* Devon in turn filed a third party complaint against Magnolia and St. Paul, claiming that Magnolia was obligated to indemnify Devon under the Master Service Agreement and that St. Paul owed Devon insurance coverage. *Id.* These claims would be valid under the maritime law, but neither would be valid under the Louisiana Oilfield Indemnity Act. *See* Apx. at 13a. Accordingly, this case presents the question whether the contract was a maritime contract governed by maritime law, or a non-maritime contract governed by Louisiana law as

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[1] *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969); *Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 497 (5th Cir. 2002).

per the terms of the choice of law provision in the Master Service Agreement.

Both the district court and the Fifth Circuit concluded that the contract to repair the fixed platform was a maritime contract governed by maritime law. Apx. at 6a, 10a, 22a. In reaching this conclusion, both courts relied on *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990). *Id.*

REASONS FOR GRANTING THE PETITION

This case involves an issue important to the uniformity of federal admiralty jurisdiction jurisprudence. The Second and Ninth Circuits have recognized that the question of whether a contract is a maritime contract is governed by this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), and that this decision requires a reevaluation of prior maritime contract jurisdiction decisions. The Fifth Circuit's decision, on the other hand, completely ignored *Kirby*, and applied a pre-*Kirby* methodology that is contrary to both the letter and spirit of *Kirby*. The Fifth Circuit's methodology not only makes it impossible for parties engaged in oilfield activities to know the extent of their rights and obligations, but seriously disrupts the uniformity of federal admiralty jurisdiction jurisprudence.

I. THE TOUCHSTONE: *NORFOLK S. RY. CO. V. JAMES N. KIRBY, PTY LTD.*

In *Kirby*, this Court held that a through bill of lading calling for ocean transportation from Australia to Savannah, and subsequent land transportation from Savannah to Huntsville, Alabama was a maritime contract. In reaching this conclusion, the Court stated the following principles:

1. "[T]he boundaries of admiralty jurisdiction over contracts—as opposed to torts or crimes—[are] conceptual rather than spatial."[2]
2. The question of whether a contract is maritime "depends upon . . . the nature and character of the contract."[3]
3. The "true criterion is whether [the contract] has 'reference to maritime service or maritime transactions.'"[4]
4. The "fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'"[5]
5. The conceptual approach requires the court to "focus . . . [the] inquiry on whether the principal objective of a contract is maritime commerce."[6]
6. "If a [contract's] sea components are insubstantial, then the [contract] is not a maritime contract."[7]

II. APPLICATION OF *KIRBY* BY THE SECOND AND NINTH CIRCUITS

Though these principles set forth in *Kirby* were drawn from prior jurisprudence, both the Second and

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[2] 543 U.S. at 23, *quoting Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961).

[3] 543 U.S. at 24, *quoting N. Pac. S.S. Co. v. Hall Bros. Marine Ry. & Shipbuilding Co.*, 249 U.S. 119, 125 (1919).

[4] *Id.*

[5] 543 U.S. at 25 (emphasis in original), *quoting Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 608 (1991).

[6] 543 U.S. at 25.

[7] 543 U.S. at 27 (emphasis in original).

Ninth Circuit have recognized that *Kirby* creates a new distinction between "conceptual" and "spatial" approaches[8] that extends beyond prior case law, and requires reevaluation and reversal of prior decisions.

Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.[9] presented the question whether a policy of liability insurance issued to a company that cleaned the tanks of coastal and ocean-going vessels was a policy of marine insurance subject to the court's admiralty jurisdiction and governed by the marine insurance law doctrine of utmost good faith. The Second Circuit first addressed its own decisions that had held that in determining whether a contract was subject to admiralty jurisdiction and maritime law, the court must first make a "'threshhold inquiry' into the subject matter of the *dispute*."[10] While not directly overruling these cases, the court questioned "the extent to which this Court's threshold inquiry survives the Supreme Court's most recent admiralty decision [*Kirby*]."[11] As we shall see, the Fifth Circuit's methodology involves an inquiry very similar to the "threshold inquiry" the Second Circuit saw as conflicting with *Kirby*.

The *Folksamerica* court next addressed the rule in its jurisprudence whereby a court could exercise admiralty jurisdiction over a contract if the non-maritime elements were "merely incidental" to the maritime ones. *Id.* at 314. The court found that this approach was inconsistent with what it described as the "global principle" mandated by *Kirby*, whereby

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[8] 543 U.S. at 25-27.

[9] 413 F.3d 307 (2d Cir. 2005).

[10] *Id.* at 312 (emphasis in original).

[11] *Id.* at 313.

the focus is on "whether the principal objective of the contract is maritime commerce."[12] As we shall see, the Fifth Circuit's methodology is similarly inconsistent with this "global principle."

In *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*,[13] the Ninth Circuit similarly concluded that *Kirby* had undercut prior maritime contract jurisdiction jurisprudence and required a different analysis. There, the question was also whether an insurance policy that insured both marine and non-marine risks was a maritime contract within the court's jurisdiction and governed by the federal marine insurance doctrine of utmost good faith. According to the Ninth Circuit, under *Kirby* "the dispositive inquiry must be 'whether the principal objective of [the] contract is maritime commerce.'"[14] Then, the court concluded that the "primary objective test" was incompatible with prior cases that had held that admiralty jurisdiction and maritime law could apply to "severable" maritime obligations in a contract that was predominantly non-maritime: "We find that our 'severability' exception collapses in the wake of the *Norfolk* Court's conceptually based 'primary objective' test."[15] As we shall see, the Fifth Circuit's decision ignores the question of whether the primary objective of the contract is maritime commerce, and the *Davis & Sons* test it used to reach that conclusion is by definition a version of the "severability" test.

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[12] *Kirby*, 543 U.S. at 25.

[13] 481 F.3d 1208 (9th Cir. 2007).

[14] *Id.* at 1218, *quoting Kirby*, 543 U.S. at 25.

[15] *Id.*

III. THE FIFTH CIRCUIT'S *DAVIS & SONS* TEST IS IRRECONCILABLE WITH THE SECOND AND NINTH CIRCUIT DECISIONS

One of the most frequently recurring and frequently litigated issues in states with offshore oil operations is whether a contract for services is a maritime contract subject to federal admiralty jurisdiction and federal maritime law, or a non-maritime contract governed by state law.[16] The question typically arises in indemnity disputes like the one presented here, because maritime law differs significantly from the laws of both Texas and Louisiana over the enforceability of indemnity agreements whereby a contractor is asked to indemnify its cus-

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[16] For instance, since *Davis & Sons*, reported cases involving this issue have included *Thibodeaux v. Vamos*, 487 F.3d 288 (5th Cir. 2007); *Hoda v. Rowan Companies, Inc.*, 419 F.3d 379 (5th Cir. 2005); *Diamond Offshore Co. v. A&B Builders, Inc.*, 302 F.3d 531 (5th Cir. 2002); *Roberts v. Energy Development Corp.*, 235 F.3d 935 (5th Cir. 2000); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474 (5th Cir. 1993); *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); *Smith v. Penrod Drilling Corp.*, 960 F.2d 456 (5th Cir. 1992); *Alleman v. Omni Energy Services Corp.*, 434 F. Supp. 2d 405 (E.D. La. 2006); *Lockerman v. Global Santa Fe Drilling Co.*, 213 F. Supp. 2d 778 (S.D. Tex. 2002); *Tullos v. Cal Dive Intern., Inc.*, 188 F. Supp. 2d 709 (S.D. Tex. 2002); *Verdin v. Ensco Offshore Co.*, 104 F. Supp. 2d 682 (W.D. La. 2000), *aff'd*, 255 F.3d 24 (5th Cir. 2001); *Certain Underwriters at Lloyds, London v. Oryx Energy Co.*, 957 F. Supp. 930 (S.D. Tex. 1997), *rev'd on other grounds*, 142 F.3d 255 (5th Cir. 1998); *Scott v. DelMar Offshore Servs., Inc.*, 943 F. Supp. 764 (S.D. Tex. 1996); *Wagner v. McDermott, Inc.*, 899 F. Supp. 1551 (W.D. La. 1994), *aff'd*, 79 F.3d 20 (5th Cir. 1996); and *Teledyne Movable Offshore, Inc. v. Leasco Fleeting & Barge Service, Inc.*, 827 S.W.2d 633 (Tex. App.—Beaumont 1992, writ denied).

tomer for the customer's own negligence. Under maritime law, these agreements are generally enforceable so long as the indemnity provision is clear and unequivocal, whereas both Texas and Louisiana have statutes that severely limit the enforceability of such provisions.[17] In short, the question presented by this case has been and will continue to be a recurring subject of litigation in states with offshore oil production so long as the law is uncertain.

In *Davis & Sons*, the Fifth Circuit attempted to come up with a test that would assist parties and courts in answering this question. As was the case here, the work was done under a "Master Service Agreement" that envisioned that the oil company would from time to time require the services of the contractor. The contractor argued for the application of state law, asserting that since 70% of the work the contractor had done under the Master Service Agreement was land-based, the contract should be considered non-maritime in nature. The Fifth Circuit rejected this argument, holding that "this does not foreclose the application of maritime law to the work orders applicable to some or all of the 30% vessel-based services as maritime obligations rendered pursuant to the contract for these services."[18]

This notion that each job performed under the Master Service Agreement should be considered a separate contract is irreconcilable with both the Second Circuit's conclusion that *Kirby* mandated a "global principle" and the Ninth Circuit's conclusion that *Kirby* had overruled cases that had held that

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[17] *See Hoda*, 419 F.3d at 380; LA. REV. STAT. ANN. § 9:2780; TEX. CIV. PRAC. & REM. CODE § 127.003.

[18] 919 F.2d at 316.

maritime jurisdiction and law could apply to the "severable" maritime obligations in a contract that was principally non-maritime. In both *Folksamerica* and *Sentry Select*, application of the *Davis & Sons* rule would have required the court to look to the particular insurance claim being made rather than the contractual relationship between the parties as a whole. Instead, those courts read *Kirby* as requiring a determination of whether the contract as a whole was maritime or not, not whether particular parts of the contract or particular claims could be viewed as maritime.

Having concluded that it should look to each individual job instead of the contract as a whole to determine whether work performed under the Master Service Agreement was maritime, the Fifth Circuit in *Davis & Sons* then proceeded to formulate a test to determine whether the particular work order was maritime or not. According to the Fifth Circuit, this required consideration of the following factors:

1. What does the specific work order in effect at the time of the injury provide?
2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?

6. What work was the injured worker actually doing at the time of the injury?[19]

These factors are on their face irreconcilable with the Second and Ninth Circuit decisions.

In *Folksamerica*, the Second Circuit strongly suggested that its prior cases requiring a "'threshhold inquiry' into the subject matter of the *dispute*" were irreconcilable with the "global principle" enunciated in *Kirby*. On the other hand, the requirement set forth in *Davis & Sons* that the court consider the work actually done by the crew, the "principal work of the injured worker," and "what work . . . the injured worker [was] actually doing at the time of the injury" are by their very nature dispute-specific; they focus attention on facts unique to the particular dispute, not on "whether the principal objective of [the] contract is maritime commerce."

Moreover, these factors by necessity are based upon a notion of "severability" expressly rejected by the Ninth Circuit in *Sentry Select*, in that they suggest that a different result may obtain depending upon which worker is injured and what that particular worker is doing when injured. *Davis & Sons* thus creates the potential for disparate treatment of different aspects of the same job, whereby an indemnity claim relating to a worker doing non-maritime work injured on land would be governed by different law than an indemnity claim relating to a worker who is working on a vessel at the time of injury. This possibility of an unpredictable jurisdictional matrix that is constantly changing during the course of a job as workers change tasks and location is inherently inconsistent with the conclusion of the Second and

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[19] *Id.* at 316.

Ninth Circuits that the jurisdictional question should be answered by looking at the contract as a whole.

The *Davis & Sons* inquiry into whether "the crew [was] assigned to work aboard a vessel in navigable waters" is similarly a "spatial" inquiry at odds with the "conceptual" focus of *Kirby* as interpreted by the Second and Ninth Circuits: "To ascertain whether a contract is a maritime one, we cannot look to whether a ship or other vessel was involved in the dispute";[20] "Geography . . . is useful only in a limited sense: If a bill's *sea* components are insubstantial, the bill is not a maritime contract."[21]

The question of whether the crew contributed to the mission of the vessel could be conceivably help in determining "whether the principal objective of [the] contract is maritime commerce," as could the question of "what does the specific work order in effect at the time of the injury provide?" As we shall see, however, in this case the Fifth Circuit interpreted this aspect of the *Davis & Sons* test to make the inquiry "dispute" oriented rather than "global," and "spatial" rather than "conceptual."

IV. *DAVIS & SONS* AS APPLIED IN THIS CASE IS IRRECONCILABLE WITH THE SECOND AND NINTH CIRCUIT DECISIONS AND WITH *KIRBY* ITSELF

In concluding that the contract between Devon and Magnolia was a maritime contract, the Fifth Circuit interpreted *Davis & Sons* in a way that brings the law of the Fifth Circuit into even more stark contrast with its sister circuits. As noted above, the first

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[20] 413 F.3d at 313 (*quoting Kirby*, 543 U.S. at 23).

[21] 481 F.3d at 1219 (*quoting Kirby*, 543 U.S. at 27).

Davis & Sons question is "What does the specific work order in effect at the time of the injury provide?" The principal point of contention in the case was "whether the *Davis* factors should be analyzed in terms of what the parties expected would happen, or rather in terms of what actually happened during performance of the contract." Apx. at 19a. The Fifth Circuit came down squarely on the side of actual performance rather than the expectations of the parties:

> The Davis factors primarily address the nature and character of the contract as it was actually executed; that conclusion finds support in the specific language of the factors themselves . . . . [Even] the first factor . . . analyzes the specific work order "in effect at the time of injury," thus possibly contemplating that the work order "in effect" when the injury occurred could be different from the parties' *ex ante* expectations.

Id. at 20a.

While this may have been a reasonable interpretation of *Davis & Sons* itself, it is irreconcilable with *Kirby* as interpreted by the Second and Ninth Circuits, since focusing on the work that is actually done focuses on the particular dispute rather than on the contract as a whole. The Fifth Circuit's opinion even goes so far as to point out that while "some [work] was performed on the fixed platform, . . . all the welding work was performed on [the vessel]." Apx. at 12a. In point of fact, the welding was the only task that was performed on the vessel, Apx. 4-5a, and the Fifth Circuit's fixation on how one particular task was in fact performed cannot be considered viewing the contract "globally" as required by the Second and Ninth Circuits.

This focus on actual performance is also by necessity a spatially focused inquiry. Here, Mr. Thomas was expected to work on the platform, but the fact that he did the same work on the vessel led to a different result. Both the Second and Ninth Circuits recognized that the location of the work and the place of injury is largely irrelevant. "Geography . . . is useful only in a limited sense: If a bill's *sea* components are insubstantial, the bill is not a maritime contract."[22] As this Court stated in *Kirby*, "we cannot look to whether a ship or other vessel was involved in the dispute . . . [n]or can we simply look to the place of the contract's . . . performance."[23] Instead, the question is what was the "nature and character" of the work, and "whether the principal objective of [the] contract is maritime commerce." The Fifth Circuit's focus on what was actually done and where it was done cannot be reconciled with the Second and Ninth Circuit's decisions.

The conflict between the ruling below and the interpretation given *Kirby* by the Second and Ninth Circuits is highlighted when one considers how those cases would have been decided under the two approaches with a slight variation in the facts. The plaintiff in *Folksamerica* was injured on a vessel, but under the Second Circuit's application of the "global principle" it thought was mandated by *Kirby*, it would have made no difference to the outcome if the worker had happened to have been injured on land—the insurance policy at issue principally insured maritime risks, and was hence a maritime contract. Similarly, *Sentry Select* arose out of a claim by a Jones

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[22] *Id.*; *see also* 413 F.3d at 313 (*quoting Kirby*, 543 U.S. at 23).

[23] 543 U.S. at 23-24.

Act seaman who was injured on land, but it would have made no difference if he had been injured at sea, since the insubstantial maritime risk insured under the excess/umbrella policy at issue could not under *Kirby* be severed from the overwhelmingly non-maritime remainder of the policy. Under the holding of the Fifth Circuit here, however, focusing on what actually occurred would probably have compelled a different result.

The Fifth Circuit apparently concluded that the only jurisprudence that it needed to consider to determine whether an oilfield service contract was a maritime contract subject to federal admiralty jurisdiction and maritime law was *Davis & Sons*, and that *Kirby* was irrelevant to this question. This approach is in irreconcilable conflict with the Second and Ninth Circuits, both of which concluded that while *Kirby* on its facts involved carriage of goods under intermodal bills of lading, this Court was setting forth a rule of general application to the question of maritime contract jurisdiction. The Fifth Circuit's apparent conclusion that *Kirby* is of limited application and does not effect the Fifth Circuit's maritime contract jurisdiction jurisprudence in the context of oilfield service contracts is at loggerheads with Second and Ninth Circuit's conclusion that *Kirby* set forth a rule of general application.

V. THE RAMIFICATIONS OF A SPLIT IN THE CIRCUITS

The Fifth Circuit's application and extension of *Davis & Sons* is a matter of extreme practical and jurisprudential importance. As pointed out above, the precise issue presented in this case of how one determines whether a contract for services in the offshore oil industry is a maritime contract is a mat-

ter that has plagued the industry for decades.[24] Admittedly, there is probably no simple test to use to answer this question, but the test set forth by this Court in *Kirby*—"whether the principal objective of [the] contract is maritime commerce"—is clearly better than a test that can be manipulated to convert a contract to do repair work on "land" (a fixed platform) into a maritime contract. If the Fifth Circuit rule that has its genesis in *Davis & Sons* and culminates in the decision below is allowed to stand, the issue will continue to be litigated *ad infinitum*, and service contractors, their oil company customers and the insurers that insure them both will be continue to be unable to evaluate their risks and operate their business efficiently.

But the Fifth Circuit's decision has implications well beyond the offshore oil and gas industry. The failure even to cite *Kirby* suggests that the Fifth Circuit believes the *Kirby* is not intended for general application, leaving open the possibility that it would take a pre-*Kirby* approach to determining whether a broad spectrum of contracts were subject to federal jurisdiction and law. Moreover, if the offshore oil and gas industry is to be carved out of the application of *Kirby*, what other exceptions might there be? Offshore activities are expanding to include new technologies such as offshore windfarms for the generation of electricity; will the jurisdictional question with respect to contracts in use in other industries be decided by using a single standard designed to limit federal jurisdiction to core maritime concerns, or will the issue be decided by industry-specific standards? In *Kirby*, this Court reiterated that the underlying purpose of vesting the federal courts with admiralty

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[24] *See supra* page 9, note 16.

jurisdiction and the creation of a body of specialized rules of maritime law is the national interest in protecting maritime commerce, and Petitioners submit that this national purpose is ill-served by applying different rules to determine whether particular types of contracts or contracts used in particular industries need a uniform treatment. Petitioners submit that this Court should grant certiorari to determine whether the Fifth Circuit's approach is compatible with the interpretation given *Kirby* by the Second and Ninth Circuits, and with the decision of this Court in *Kirby* itself.

CONCLUSION

This Court should hold that the Fifth Circuit's *Davis & Sons* test cannot survive this Court's decision in *Kirby*. Based on that holding, this Court should grant the Petition for Writ of Certiorari, reverse the judgment of the Fifth Circuit and Southern District of Texas, and remand for further proceedings under the *Kirby* standard.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

[Filed Feb. 09, 2005]

CIVIL ACTION NO. G-04-657

DEVON LOUISIANA CORPORATION, *et al.*,
Plaintiffs,

v.

PETRA CONSULTANTS, *et al.*,
Defendants.

ORDER DENYING IN PART AND GRANTING IN PART MAGNOLIA INDUSTRIAL FABRICATORS, INC.'S MOTION FOR SUMMARY JUDGMENT AND GRANTING IN PART DEVON LOUISIANA CORPORATION'S MOTION FOR SUMMARY JUDGMENT

This lawsuit concerns claims for defense and indemnity arising out of claims by Harry Thomas, an employee of Magnolia Industrial Fabricators, Inc. ("Magnolia"). Now before the Court comes the Motion for Summary Judgment by Magnolia and the Motion for Summary Judgment by Devon Louisiana Corporation ("Devon"). For the reasons stated below, Magnolia's Motion is GRANTED IN PART and DENIED IN PART, and Devon's Motion is GRANTED IN PART. The Court does not yet reach Devon's Motion as it applies to Petra Consultants, Inc.

I. Background

Harry Thomas, Jr. ("Thomas"), an employee of Magnolia, filed suit as a result of injuries allegedly sustained while working aboard the M/V PETER CALLAIS, a vessel owned by Abdon Callais Offshore, LLC ("Abdon Callais"). Devon had a Master Service Agreement with Magnolia for Magnolia to provide maintenance for Devon's offshore oil and gas production platform. Devon also had a Master Service Agreement with Petra Consultants, Inc. ("Petra") for Petra to provide supervisors for the work done on the platform. Devon had another agreement with GulfFleet Marine, Inc. ("GulfFleet") to provide transportation and accommodations for the workers. GulfFleet did not have a vessel available for the trip in question, so it arranged for Abdon Callais to provide a vessel.

Thomas went out on the PETER CALLAIS as part of a Magnolia crew. The crew was supervised by a Petra employee, Herbert Mouton. Thomas alleged that he was injured when a wave hit him as he was on the deck of the vessel untying a tag line. Thomas testified in his deposition that he performed all his work on the vessel and that he never went on the platform.

This Court severed Thomas's claims from the claims and cross-claims for defense and indemnity. The underlying case recently settled, with Petra and Abdon Callais funding the settlement.

II. Summary Judgment Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d

265 (1986). The party moving for summary judgment bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. The non-moving party must come forward with "specific facts showing there is a genuine issue for trial." Fed. R. Civ. P. 56(e), *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986). The court must view all evidence in the light most favorable to the non-movant. *See, e.g., Broussard v. Parish of Orleans*, 318 F.3d 644, 650 (5th Cir. 2003), *cert. denied*, 539 U.S. 915, 123 S. Ct. 2276, 156 L. Ed. 2d 130 (2003). If the evidence would permit a reasonable fact finder to find in favor of the non-moving party, summary judgment should not be granted. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986).

III. Analysis

The Master Service Agreement ("MSA") between Magnolia and Devon provides that Magnolia must indemnify Devon from any claims arising out of the work performed by Magnolia, even if those claims arose from Devon's own negligence. The MSA also requires Magnolia to have Devon named as an additional insured on a comprehensive general liability insurance ("CGL") policy. Magnolia obtained such a policy from St. Paul Surplus Lines ("St. Paul") with an "additional protected persons" clause, which stated that any person or organization that Magnolia agreed in a written contract to add as an additional insured would be a protected person. The MSA's choice of law provision provides that general maritime law will

govern, but that if maritime law is ever found inapplicable, then Louisiana law will apply.

Devon claims that Magnolia owes it indemnity under the MSA and that Magnolia breached its contract by failing to provide the proper insurance. Magnolia claims that maritime law does not apply to the contract and that Louisiana law invalidates both the indemnity and insurance provisions, but that in any case, it did have Devon named as an additional insured on the policy from St. Paul. Magnolia also argues that because Gulf Fleet and its insurer provided Devon defense and indemnity in this case, Devon has no damages.

A. Choice of Law

Whether the indemnity and insurance provisions in the MSA are valid depends on whether the contract is governed by maritime law. In *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1991), the Fifth Circuit set out the factors used in characterizing a contract as maritime:

> 1) [W]hat does the specific work order in effect at the time of the injury provide? 2) what work did the crew assigned under the work order actually do? 3) was the crew assigned to work aboard a vessel in navigable waters; 4) to what extent did the work being done relate to the mission of that vessel? 5) what was the principal work of the injured worker? and 6) what work was the injured worker actually doing at the time of injury?

In this case, the work order in effect at the time of the injury was a 21-item punch list of jobs to be done. Because of bad weather, the crew completed only some of the tasks. One of completed tasks, replacing the heliport skirting panel, was done on the vessel be-

cause of the lack of a hot work permit for the platform. (Williams Dep. at 78.) The rest were done on the platform. Magnolia argues that it anticipated that all work would be done on the platform, but that when the crew arrived, there was not a hot work permit for the platform so the welding jobs had to be done on the vessel. Mac Williams, the Magnolia supervisor, testified that all but two of the items would have been done on the platform had weather permitted the completion of the items on the list. (Williams Dep. at 78-85.) However, another company, Waveland Services, also sent a painting crew to do some of the work, so it is not clear from the record which items on the punch list would have been done by the Magnolia crew. (Enderlin Dep. at 27-28.) Also, comparing the number of jobs done on the platform to the number of jobs done on the vessel does not fully describe the situation; one job may have been far more substantial than all the rest.

Magnolia argues that the mission of the vessel was to provide transportation for the workers but not to serve as a work platform. Devon argues that the vessel was analogous to the barge in *Davis*, which served as a mobile work platform. Thomas testified that the boat had three welding machines which were used on this trip, but the platform had no welding machines. (Thomas Dep. at 46.) Certain fabrication work was done on the vessel using these machines. The workers also moved equipment on and off the vessel. Therefore, it appears that part of the vessel's mission was to aid in the platform repairs, and Thomas's work related to that mission. Also, while some of the workers performed work on the platform, they also worked on the vessel, indicating an assignment to work on a vessel in navigable waters.

Thomas testified that he never left the vessel, and while his supervisor testified that all of the jobs on the punch list would have been done on the platform if the proper permit had been obtained, it is not clear from the record that Thomas's job as a rigger would have actually been performed on the platform. (Thomas Dep. at 43.) Based on his testimony, it appears that he helped move equipment and parts from the vessel to the platform while remaining on the vessel. At the time of the incident, he was untying a tag line while on the vessel.

Much of Magnolia's argument depends on its contention that it did not expect any work to be performed on the vessel, and that those expectations, rather than the actual events, should control. However, Magnolia must have expected maritime law to apply to the MSA since it agreed that general maritime law would apply unless a court found it inapplicable. The MSA provided that Louisiana law would apply only as a second choice.

This Court finds that the *Davis* factors show the maritime nature of the contract between Devon and Magnolia. Additionally, the underlying complaint by Thomas was governed by admiralty law, which adds to the "salty flavor" of the case. *Davis*, 919 F.2d at 316 (quoting *Kossick v. United Fruit Co.*, 365 U.S. 731, 742, 81 S. Ct. 886, 894, 6 L. Ed. 2d 56 (1961)).

Because maritime law applies, the indemnity and additional insured provisions in the MSA between Devon and Magnolia are valid and enforceable. Magnolia must indemnify Devon according to the terms of the MSA, subject to the showing of damages by Devon, as discussed below.

B. Breach of Contract

Devon claims that Magnolia breached its contract to have Devon named as an additional insured on Magnolia's CGL policy. Magnolia has produced a CGL policy from St. Paul stating that whenever Magnolia agrees in a written contract to have another company listed as an additional insured, that company will be a protected person under the policy. The fact that St. Paul has not paid Devon any money under the policy does not indicate that Magnolia breached its contract with Devon but only that Devon has a dispute with St. Paul. Devon has not shown that a genuine issue of material fact exists as to whether Magnolia breached the contract. Therefore, the Court finds that Magnolia did not breach its contractual obligation to have Devon named as an additional insured on the CGL policy.

C. Damages

Magnolia argues that Devon's claim should be denied because Devon already received defense and indemnity from Gulf Fleet and its insurer. Devon must show actual out-of-pocket expenses to receive any funds from Magnolia under the indemnity provision in the MSA. This Order does not give Devon the right to double payment of its expenses in the underlying case; the Court does not intend to create a windfall for any Party.

IV. Conclusion

For the reasons stated above, Magnolia's Motion for Summary Judgment is DENIED as to Devon's claim for indemnity and GRANTED as to Devon's breach of contract claim. Devon's Motion for Summary Judgment is GRANTED as to the indemnity claim against Magnolia only. The Court does not yet reach any of

Devon's claims against other Parties. A Final Judgment regarding this and all other claims will be entered in due course.

IT IS SO ORDERED.

DONE this 8th day of February, 2005, at Galveston, Texas.

/s/ Samuel B. Kent
SAMUEL B. KENT
UNITED STATES DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed September 13, 2007]

No. 05-40344

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.; *et al.*,
Defendants,

MAGNOLIA INDUSTRIAL FABRICATORS, INC.,
Defendant-Appellant.

No. 05-40347

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

ST. PAUL SURPLUS LINES,
Defendant-Appellant.

No. 05-40350

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Third-Party Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.,
Defendant-Third-Party Defendant-Appellant.

Appeals from the United States District Court
for the Southern District of Texas
No. 3:04-CV-657

Before SMITH, GARZA, and OWEN, *Circuit Judges.*

PER CURIAM:*

Devon Louisiana Corporation ("Devon") seeks contractual indemnity from the defendants for costs incurred while defending a lawsuit for personal injuries sustained by a worker during repairs to Devon's offshore oil and gas platform. Defendants appeal an adverse interlocutory ruling that the contractual indemnity provision is valid and enforceable under maritime law. We affirm.

I.

Devon owns an offshore oil and gas production platform maintained and operated by independent

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

contractors. Devon had almost identical "Master Service Agreements" ("MSA's") with Magnolia Industrial Fabricators ("Magnolia") and Petra Consultants ("Petra"). The MSA's served as blanket agreements that are not complete by themselves and called for no specific work but contemplated that "from time to time" Devon would initiate a work order requesting that Magnolia and/or Petra "perform certain work or furnish certain services." Under the MSA's, Magnolia and Petra agreed to defend and indemnify Devon against all claims arising from work performed under the MSA's, and Magnolia and Petra were required to name Devon as an "additional insured" in a comprehensive general liability ("CGL") policy.

Magnolia named Devon as an "additional insured" on a CGL policy from St. Paul Surplus Lines ("St. Paul"), and Petra did the same on a policy from The Gray Insurance Co. ("Gray"). Devon had an additional MSA with Gulf Fleet Marine ("Gulf Fleet") under which Gulf Fleet was to provide vessel support services. The Devon/Gulf Fleet MSA required Gulf Fleet to provide defense, indemnity, and insurance for incidents arising out of the MSA.

Pursuant to the MSA's, a Magnolia crew was dispatched to complete a "punch list" of repairs to Devon's platform, and a Petra employee supervised the work. Gulf Fleet did not have an available vessel to support the repair crew, so it contacted Abdon Callais Offshore, L.L.C., the owner of the M/V PETER CALLAIS, to provide vessel support services; the crew was transported to the platform aboard the PETER CALLAIS. Some of the repairs required Magnolia to use welding equipment. Because there was no "hot work" permit, those fabrication and cutting procedures could not be performed aboard the

fixed platform; the welding equipment remained on the PETER CALLAIS, and the procedures were performed on the vessel.

The crew encountered inclement weather and was unable to complete all the items on the punch list. Of the work that was completed, some was performed on the fixed platform, but all the welding work was performed on the PETER CALLAIS. While moving heavy equipment on the PETER CALLAIS's deck, Harry Thomas, a rigger employed by Magnolia, was injured when a wave propelled him into some welding equipment.

II.

Thomas sued Devon and other parties for his injuries. Devon filed a third-party complaint against Gulf Fleet and its insurer, Boston Old Colony Insurance Company ("Boston Old Colony"), for breach of contract and insurance obligations under the Devon/Gulf Fleet MSA. Devon filed third-party complaints against Magnolia for breach of the insurance and indemnity provisions in the Devon/Magnolia MSA and against St. Paul for breach of its insurance obligations. Gulf Fleet and Boston Old Colony agreed to defend and indemnify Devon against Thomas's personal injury claims.

Devon, Gulf Fleet, and Boston Old Colony filed third-party claims against Petra for negligence and breach of its defense, indemnity, and insurance obligations under the Devon/Petra MSA; they also alleged that Boston Old Colony was subrogated to Devon's claims against Petra and that the failure of Petra's and Magnolia's insurance carriers (Gray and St. Paul, respectively) to indemnify Gulf Fleet and Boston Old Colony were breaches of the MSA's.

Petra then sought and obtained leave to file a counterclaim against Gulf Fleet and Boston Old Colony alleging that Gulf Fleet and Boston Old Colony breached a contract to provide insurance to Petra.

Magnolia and Petra separately moved for summary judgment seeking dismissal of Devon's claims for defense, indemnity, and insurance coverage. They argued that Louisiana law governs the contract and that the indemnity and insurance obligations are unenforceable under the Louisiana Oilfield Indemnity Act ("LOIA"), which provides, in part, that "any provision contained in . . . an agreement pertaining to a well for oil, gas, or water . . . is void and unenforceable to the extent that it purports to or does provide for defense or indemnity . . . to the indemnitee against loss or liability for damages arising out of or resulting from death or bodily injury to persons . . . ." LA. REV. STAT. ANN. § 9:2780(B) (2005).

Magnolia and Petra also moved for summary judgment on Devon's breach of contract claims regarding their obligation to have Devon named as an additional insured. Devon filed responses and filed cross-motions for summary judgment, arguing that the indemnity and insurance provisions were enforceable under maritime law and that summary judgment was appropriate for Devon's breach of contract claims regarding the "additional insured" provisions.

The district court granted in part and denied in part each summary judgment motion. The court found that Petra and Magnolia had not breached their contractual obligation to have Devon named as an additional insured; consequently, it granted Petra's and Magnolia's motions as to the "additional insured" breach of contract claims and denied Devon's motions on these claims. The court also found that

maritime law governs the MSA's and that the indemnity and insurance provisions are valid and enforceable. It therefore granted Devon's motion as to the indemnity and insurance claims and denied Magnolia's and Petra's motions on those claims.

St. Paul moved for summary judgment on Devon's claims that St. Paul had breached its contractual obligation to insure Devon. St. Paul argued (i) that the LOIA renders the "additional insured" provision unenforceable and (ii) that St. Paul does not owe Devon anything under Magnolia's CGL policy because Devon breached its contract with Magnolia by failing to reimburse Magnolia for the insurance premiums. The district court denied St. Paul's motion. It concluded that maritime law governs the MSA and that the additional insured provisions are therefore valid and enforceable. It also held that Devon's conduct did not breach the CGL policy between Magnolia and St. Paul and that St. Paul is therefore required to insure Devon as required by the policy.

In this interlocutory appeal, Magnolia, Petra, and St. Paul assert that the district court erred in concluding that maritime law governs the MSA's. They argue that the district court should have concluded that the MSA's are governed by Louisiana law, under which the defense, indemnity, and insurance provisions are void and unenforceable. St. Paul also asserts that it was entitled to summary judgment on Devon's breach of contract claim as to the "additional insured" provision in Magnolia's CGL policy. The appeals have been consolidated in this proceeding.

III.

Devon claims that this court does not have jurisdiction. The regional courts of appeals have jurisdic-

tion over "[i]nterlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed." 28 U.S.C. § 1292(a)(3) (2000). "Courts have tended to construe this provision rather narrowly and it has not been read to permit interlocutory appeals in admiralty except where the order, regardless of the label affixed to it had the effect of determining the rights and obligations of the parties." *In re Complaint of Ingram Towing Co.*, 59 F.3d 513, 516 (5th Cir. 1995). But it is "not necessary for all of the rights and liabilities of all of the parties [to] be determined" as long as "the order appealed from . . . conclusively determine[d] the merits of a claim or defense." *Associated Metals & Minerals Corp. v. ALEXANDER'S UNITY MV*, 41 F.3d 1007, 1010 (5th Cir. 1995) (internal quotations omitted).

The district court determined that "Magnolia [and Petra] must indemnify Devon according to the terms of the MSA" and that "St. Paul must insure Devon as required by the [CGL] policy." Even though there are unresolved issues affecting the parties' rights and liabilities, the district court's orders determined the rights and liabilities of the parties with respect to the primary indemnity and insurance claims at issue in these disputes. We therefore have jurisdiction over these interlocutory appeals, so we deny Devon's motion to dismiss for want of jurisdiction.

IV.

We review the denial of summary judgment *de novo*, using the same standards as did the district court. *Strong v. B.P. Exploration & Prod., Inc.*, 440 F.3d 665, 668 (5th Cir. 2006). The principal issue is whether the MSA's are governed by maritime law or

Louisiana law. Maritime law applies to contracts determined to be maritime in nature. Determination of the nature of a contract depends in part on historical treatment in the jurisprudence and in part on a fact-specific inquiry." *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313, 316 (5th Cir. 1990). We determine whether a contract is maritime by applying the six-factor test in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d at 316: "(1) [W]hat does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury?" "The maritime or non-maritime status of the contract ultimately depends on its 'nature and character,' not on its place of execution or performance." *Hoda v. Rowan Co.*, 419 F.3d 379, 381 (5th Cir. 2005) (quoting *Davis*, 919 F.2d at 316).

A.

In some cases, the historical treatment in the jurisprudence may obviate the need for a fact-specific inquiry. Because, however, we have not previously considered whether a contract to repair a fixed platform is maritime, this first prong of the Davis analysis is inconclusive. Nevertheless, our cases dealing with offshore oil and gas contracts provide helpful suggestions on how the present case should be resolved.[1]

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[1] *Cf. Hoda*, 419 F.3d at 381 (5th Cir. 2005) ("*Davis*'s initial reference to the 'historical treatment in the jurisprudence,'

The defendants argue that a contract for the mere repair of a fixed platform cannot be maritime, because this court held in *Laredo Offshore Constructors, Inc. v. Hunt Oil Co*, 754 F.2d 1223, 1231 (5th Cir. 1985), that a contract for the construction of a fixed offshore platform is not maritime. In *Laredo*, however, it was the plaintiff's failure to complete its contractual obligations to construct the platform that "gave rise to" the lawsuit. *Id.* We noted that the result might be different where the subject matter of a contract has a "direct relationship with . . . traditional subjects of maritime law." *Id.*

We also held in *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393, 397 (5th Cir. 1991), that where a contract is only incidentally related to a vessel's mission, it is not maritime.[2] *Domingue* involved a contract for wireline services on an offshore well. *Id.* at 394. The work order required the crew to use a jack-up drilling rig. *Id.* Although a jack-up rig has been classified as a vessel for maritime law purposes,[3] in *Domingue* the use of a vessel was purely incidental to the execution of the contract, and nothing about the contract required that the contractor use a vessel instead of a mere work platform. *Id.* at 395, 397.

In contrast, the work in *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115, 1123 (5th Cir. 1992),

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while inconclusive, is nonetheless suggestive, for present purposes.").

[2] *See also Laredo*, 754 F.2d at 1231 ("That the contract contemplated in part the use of instruments of admiralty . . . is not sufficient" to refrain from applying state law.).

[3] *See Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537 (5th Cir. 1987).

required the use of a vessel as such. *Campbell* involved casing work that required the use of a vessel such as a jack-up rig, along with its derrick and draw works, because there was no fixed platform or derrick at the work site. *Id.* Similarly, in *Davis* we noted that the "particular nature of the terrain and production equipment required" the use of a vessel. *Davis & Sons, Inc., v. Gulf Oil Corp.*, 919 F.2d 313, 317 (5th Cir. 1990). *Davis* involved a work crew that traveled from one offshore job site to another and made various repairs to the offshore facilities and thus required a vessel "that could function as a mobile work platform." *Id.*

In *Hoda*, 419 F.3d at 379, 381, 383, we addressed an analogous situation in which the crew's "exact work did not require the use of [a] vessel," but the work "could not be performed without the [vessel's] direct involvement." *Hoda* involved the torquing up and down of the bolts on blowout preventer stacks, a task that by itself did not require the use of the vessel or its crew but that would have been irrelevant and impossible if the vessel's crew had not used the vessel's rig to set the stacks and bolts in place. *Id.* at 381.

The punch list required Magnolia's crew to make certain repairs to Devon's platform. Although the "exact work" on the punch list did not require the use of a vessel *per se*, the failure of the parties to obtain a hot work permit meant that the welding work, which was a prerequisite for completing some of the tasks on the punch list, had to be completed on a vessel, not the fixed platform. We deemed the wireline contract in *Domingue*, 923 F.2d at 397, non-maritime because the need for a vessel arose purely from the lack of a fixed platform. The contract here required that the

parties provide a vessel *per se*, because only a vessel working alongside the already existing fixed platform could provide a suitable place to perform the hot work. As was the case in *Davis, Campbell*, and *Hoda*, the instant contract required that a vessel be provided.[4]

It is undisputed that the hot work could have been completed on the oil and gas platform if the appropriate permit had been obtained. The inability to perform the hot work on the vessel was not caused by any physical or technical limitations but by the legal limitations resulting from the absence of a permit. That is, however, a distinction without a legal difference. *Hoda, Davis*, and *Campbell* do not require that the need for a vessel be caused by physical or technical limitations. There is no practical difference between having to use a vessel because of physical realities and having to use one because of legal restrictions. A vessel is required in both situations.

The jurisprudence therefore indicates that where the use of a vessel as such is required for completion of the contract, maritime law appropriately governs. We must now apply the six-factor *Davis* test to the facts.

B.

The parties ask us to consider whether the *Davis* factors should be analyzed in terms of what the parties expected would happen, or rather in terms of what actually happened during performance of the

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[4] *See also Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500-01 (5th Cir. 2002) ("Even a contract for offshore drilling services that does not mention any vessel is maritime if its execution requires the use of vessels. This is true for contracts that may also involve obligations performed on land.").

contract. Magnolia claims the parties expected that all the work would take place on the fixed platform. According to defendants, we should apply the *Davis* factors to the facts as the parties intended them when the punch list was submitted pursuant to the MSA's. Defendants contend that an intent-based analysis would compel the conclusion that the contract is non-maritime and accordingly that Louisiana law applies. Devon, on the other hand, argues that the *Davis* factors must be applied to the facts as they actually occurred: Because some of the work was required to take place on a vessel, Devon says that that approach compels the conclusion that the contract is maritime, so maritime law should apply.

The Davis factors primarily address the nature and character of the contract as it was actually executed; that conclusion finds support in the specific language of the factors themselves. The second and sixth factors speak in terms of what "actually" happened in the performance of the contract. Factors three, four, and five use the past tense to analyze what kind of work "was" being done and how it was accomplished. Only the first factor—what does the specific work order in effect at the time of injury provide—uses language that could be interpreted as taking an *ex ante* view of the contract. But the first factor also analyzes the specific work order "in effect at the time of injury," thus possibly contemplating that the work order "in effect" when the injury occurred could be different from the parties' *ex ante* expectations.

Viewed in this way, the *Davis* factors suggest that the contract is maritime. Factor six weighs strongly in favor of finding a maritime contract, because the injured worker was engaged in the inherently maritime task of securing the vessel's cargo at the time of

injury. Similarly, factors two and five weigh in favor of finding a maritime contract, because there is no dispute that Thomas and the crew were required to use, and actually did use, the vessel *qua* vessel.

Regarding factor three, we agree with the district court's determination that when the vessel departed for the platform without the requisite permit, the crew was necessarily assigned to do some of its work on the vessel. Factor one asks us to evaluate the work order in effect at the time of the injury. Although the contract initially may have been contemplated as non-maritime because all of the work on the punch list could have been performed on the fixed platform, the work order as implemented by the parties required that they use a vessel to complete some of the required tasks.

Factor four requires us to analyze the relationship between the work performed and the mission of the vessel. We agree with the district court that part of the mission was to aid in the repairs to the platform. Some of that work required the vessel to convey people and cargo to the repair site, a task integral to completing the repairs. Thomas's work as a rigger, which involved loading and unloading cargo to and from the vessel, was certainly related to the transportation function of the vessel and contributed to the repair of the platform. Similarly, the hot work that took place on the vessel was "integral" in repairing the platform, a task that was part of the vessel's mission.[5] The *Davis* factors thus weigh in favor of finding that the contract is maritime.

---

[5] *See Hoda*, 419 F.3d at 383 (citing *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 501 (5th Cir. 2002)).

Even if we were to adopt an approach that focused on the parties' *ex ante* expectations, we likely would reach the same result. The MSA's have a clause that states, "This Contract shall be governed by the General Maritime laws of the United States" unless it is judicially determined that such laws do not apply. That language indicates that the parties intended and expected that maritime law would apply. As we noted in *Hoda*, 419 F.3d at 380 n.3, "[o]ur conclusion that maritime law applies is consistent with the contract."

Because we conclude that maritime law applies to the MSA's, the indemnity provisions contained therein are valid and enforceable. We do not reach the issues of whether and to what extent Louisiana law applies.

V.

St. Paul raises the ancillary argument that, even if maritime law applies, St. Paul is not required to insure Devon pursuant to the additional insured provisions in the CGL policy between St. Paul and Magnolia. St. Paul contends it had no obligation to insure Devon because Devon breached its contract with Magnolia by failing to reimburse Magnolia for the insurance premiums.

St. Paul has abandoned this argument on appeal, because it has inadequately briefed it. St. Paul points to evidence in the record that Devon did not make premium payments; it uses that evidence primarily to urge that the additional insured provision is unenforceable under the LOIA. In addition, St. Paul includes one paragraph arguing that Devon is not entitled to additional insured coverage even if the LOIA does not apply:

> In the alternative, Devon is not entitled to additional insured coverage regardless of whether [LOIA] applies. Devon is not entitled to be named as an additional insured, because Devon breached its obligation to pay Magnolia for the additional insured coverage and, therefore, no such additional insured obligation existed.

This single paragraph with no citations to authority is insufficient to constitute an argument on appeal. We have consistently held that such arguments are abandoned for inadequate briefing. In *L & A Contracting Co. v. S. Concrete Servs., Inc.*, 17 F.3d 106, 113 (5th Cir. 1994), we held that a party had abandoned a challenge because of inadequate briefing by citing "no authority in its one-page argument on the attorney fee question."[6] Similarly, in *Kohler v. Englade*, 470 F.3d 1104, 1114 (5th Cir. 2006), we held that a party had inadequately briefed an issue because "he failed to cite any legal authority for the proposition that one has a constitutional right to have an executed search warrant filed under seal." We have also held that an argument consisting solely of one citation to an authority constituted inadequate briefing. *See Salazar-Regino v. Trominski*, 415 F.3d 436, 452 (5th Cir. 2005), *vacated on other grounds*, 127 S. Ct. 827 (2006).

In sum, maritime law applies to the MSA's, so we AFFIRM as to the defense, indemnity, and insurance issues raised on appeal, and we REMAND for further proceedings.

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[6] *See also In re Bouchie*, 324 F.3d 780, 786 (5th Cir. 2003) ("As Rush Truck cites no authority for this proposition, it is not adequately briefed and is therefore waived.").

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

[Entered Oct. 12, 2007]

No. 05-40344

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.; *et al.*,
Defendants,

MAGNOLIA INDUSTRIAL FABRICATORS, INC.,
Defendant-Appellant.

Consolidated with
No. 05-40347

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Appellee,

v.

ST. PAUL SURPLUS LINES,
Defendant-Appellant.

Consolidated with
No. 05-40350

DEVON LOUISIANA CORPORATION; *et al.*,
Plaintiffs,

DEVON LOUISIANA CORPORATION,
Plaintiff-Third-Party Plaintiff-Appellee,

v.

PETRA CONSULTANTS, INC.,
Defendant-Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas, Galveston

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ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion 9/13/07, 5 Cir.,___, ___F.3d ___)

Before SMITH, GARZA, and OWEN, *Circuit Judges*.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified

not having voted in favor, (FED. R. APP. P. and 5th CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry E. Smith
JERRY E. SMITH
United States Circuit Judge

* Judge CLEMENT did not participate in the consideration of the rehearing en banc.

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SUPREME COURT, U.S.

No. 07-931

IN THE
Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC., *et al.*,

Petitioners,

v.

DEVON LOUISIANA CORP., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Devon Louisiana Corporation is a wholly owned subsidiary of Devon Energy Corporation, Inc., a publicly held corporation.

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SUMMARY OF THE ARGUMENT

The Fifth Circuit's opinion affirming the District Court's application of the two-step *Davis* methodology for determining whether a contract is maritime or non-maritime is consistent with this Court's holdings in *Kossick v. United Fruit Co.* and *Norfolk So. Rwy. Co. v. James N. Kirby*, Pty Ltd. and Petitioners have offered no compelling reasons for this Court to grant the Petition.

STATEMENT OF THE CASE

This case presents the question when is a contract deemed "maritime" such that federal maritime law controls its interpretation. This issue arises when contracts contain both maritime and non-maritime elements. Petitioners claim that the Fifth Circuit's two-step test for determining whether the nature and character of a contract for services associated with offshore oil and gas production is maritime as set forth in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990) is inconsistent with this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), addressing a contract for intermodal transportation of goods.

The suit arises out of an injury to an oil field worker, Harry Thomas. Mr. Thomas was employed by Magnolia Industrial Fabricators, Inc. ("Magnolia") to provide services to Devon Louisiana Corp.'s ("Devon") offshore activities. Magnolia had entered into a Master Service Agreement with Devon. A Master Service Agreement ("MSA") is a contract between an oil company and a

service contractor that sets forth the terms and conditions under which work will be done if and when the oil company needs a service contractor's services. Devon's MSA with Magnolia serves as a blanket agreement and calls for no specific work, but contemplates that from time to time Devon will initiate a work order requesting that Magnolia perform certain work or furnish certain services.

The MSA between Devon and Magnolia contains provisions for the use of vessels, requirements for marine insurance coverage including maritime liability, hull and machinery, and protection and indemnity. It contains requirements that Magnolia comply with all applicable federal safety regulations, including those of the United States Coast Guard, and contains provisions for removal of wreck and debris above or below the surface of the water. The agreement also contains a provision that requires Magnolia to indemnify Devon if one of Magnolia's employees is injured and sues Devon, and requires Magnolia to have Devon named as an additional assured on the liability policy issued by St. Paul Surplus Lines ("St. Paul").

The MSA includes a choice of law clause that states "This Contract shall be governed by the General Maritime Laws of the United States." The inclusion of this language in the MSA clearly indicates that the parties intended and expected that maritime law would apply in recognition that services that Magnolia would perform for Devon would involve maritime activities and transactions.

Pursuant to the MSA between Devon and Magnolia, a Magnolia crew was dispatched to perform various maintenance and repairs to one of Devon's offshore platforms located off the coast of Louisiana in navigable waters of the United States. A vessel was needed to support the repair crew, transport the crew, their equipment, materials, and supplies to the offshore location. The vessel was also utilized to feed and lodge the Magnolia crew and served as a work platform. More particularly, the vessel's aft deck served as a work site for fabrication work, and all the welding and cutting operations performed by the Magnolia crew.

While the vessel was moored to the platform, Thomas and other Magnolia employees worked from the aft deck of the vessel rigging equipment and supplies, fabricating parts and performing welding and cutting procedures aboard the vessel. Other Magnolia employees were assigned to work aboard the offshore platform. Contrary to statements made by the Petitioners, Mr. Thomas performed all of his work aboard the vessel. The work of Thomas, as well as the work of other Magnolia employees directly contributed to the function of the vessel as a mobile work platform and staging area and as a means of marine transportation.

While handling cargo aboard the vessel, Thomas was injured when a wave propelled him into some welding equipment. Thomas sued Devon and other parties. Devon in turn bought a Third Party Complaint against Magnolia and St. Paul pursuant to the indemnity and insurance clauses in the MSA which obligated Magnolia to indemnify Devon and required St. Paul to provide Devon insurance coverage.

Magnolia and St. Paul separately moved for summary judgment seeking dismissal of Devon's claims for defense, indemnity and insurance coverage arguing that Louisiana law governs the contract and that the indemnity insurance obligations are unenforceable under the Louisiana Oil Field Indemnity Act. La. Rev. Stat. Ann. § 9:2780(b) (2005). Devon filed responses and filed Cross Motions for Summary Judgment arguing that the indemnity and insurance provisions were enforceable under maritime law.

Both the District Court and the Fifth Circuit, after careful analysis of the nature and character of the MSA and work order[1] read together, concluded that the contract between Devon and Magnolia was a maritime contract governed by maritime law and that the indemnity and insurance clauses contained within the contract were valid and enforceable. In reaching this conclusion, both courts relied on the two-step test for determining whether a contract is maritime or non-maritime, as originally set forth by this Court in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) and as applied to contracts for services associated with offshore oil and gas production as set forth in the Fifth Circuit decision in *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990).

---

1. There was no formal work order, but rather a punch list of items for repairs to Devon's platform. The contract required that the parties provide a vessel per se., because only a vessel working alongside the platform could provide a suitable place to perform the work.

REASONS FOR DENYING THE PETITION

The decisions below applied the proper standard for determining whether a contract is maritime or non-maritime. The two-step *Davis & Sons* analysis is designed to determine the nature of the MSA and subsequent work order read together, focusing on the overall character of the contract, rather than on discreet factors of the place of the contract's formation or performance. *Davis* and the Fifth Circuit's decision in this case are consistent with the mandate of *Kossick* and *Kirby*.

1. The Fifth Circuit correctly applied the proper standard in determining whether the contract is maritime or not.

The sole contention made by the Petitioners is that the Fifth Circuit in its decision in determining whether the Devon/Magnolia contract is maritime or not, applied a different standard than the one set forth in this Court's decisions in *Kossich* and *Kirby*. In reading the Fifth Circuit's decision in this case and in *Davis*, it is clear that the standard applied by the court is the exact standard originally set forth by this Court in *Kossick* and reaffirmed in *Kirby* that in determining whether a contract is maritime or non-maritime depends on the nature and character of the contract and not on its place of execution or performance.

The boundaries of admiralty jurisdiction over contracts as opposed to torts being conceptual rather than spatial, have always been difficult to draw. *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). This is

particularly true for contracts involving the offshore oil and gas industry, where the particular nature of the terrain and production equipment required to perform the services, coupled with Master Service Agreements which are inchoate, but contain terms which are to be incorporated into agreements for actual services contemplated thereunder, blur the lines between sea and land. *Davis & Sons v. Gulf Oil Corp.*, 919 F.2d 313, 314, 317 (5th Cir. 1990). These latter agreements are periodic work orders calling for the performance of specific services, but must be read together with the MSA when determining whether the true nature and character of the contract is maritime or non-maritime.

In some circumstances historical jurisprudence provides a clear enough answer as to what is or is not maritime. *Kossick v. United Fruit Co.*, 365 U.S. at 735. However, in those instances where the answer is not readily clear, further factual analysis is required to determine the nature and overall character of the contract and not simply its place of execution or performance. *Davis* involved a blanket contract for labor and general contracting services for both onshore and offshore facilities. The separate work order in Davis required a work crew to perform offshore services from aboard a vessel that could function as a mobile platform. To assist with the second step in the analysis of whether an offshore oil and gas industry blanket contract and work orders, read together, constitute a maritime contract, the Fifth Circuit in *Davis* developed a six-factor test:

(1) what does the specific work order in effect at the time of injury provide?

(2) what work did the crew assigned under the work order actually do?

(3) was the crew assigned to work aboard a vessel in navigable waters?

(4) to what extent did the work being done relate to the mission of that vessel?

(5) what was the principal work of the injured worker? and

(6) what work was the injured worker actually doing at the time of injury?

Davis & Sons v. Gulf Oil Corp., 919 F.2d at 316.

Since this court's decision in *Kirby*, the Fifth Circuit in *Hoda v. Rowen Companies, Inc.* 419 F.3d 379 (5th Cir. 2005), and in this case was presented with analogous situations to *Davis* where the work performed pursuant to the blanket contract and subsequent work order was inextricably intertwined with maritime activities and transactions.

In deciding *Kirby*, this court recognized that developments in transportation technology likewise had blurred what had previously been a bright line separating shore from sea, and required application of the two-step *Kossick* methodology to determine the subject matter of the entire contract not simply on the place of execution. In reaching this conclusion, this Court did not create a new standard for evaluating contracts, but simply reaffirmed the standard established with

Kossich and as applied in *Davis*. The two-step analysis as set forth in *Davis* is directly derived from this Court's mandate in *Kossick* and *N. Pac. SS. Co. v. Hall Bros. Marine Ry. & Shipbuilding Corp.*, 249 U.S. 119 (1919). Fifth Circuit's decisions involving offshore oil and gas service contracts since *Davis* including this case adhere to that legal standard.[2]

Prior to the Fifth Circuit's *per curiam* decision, Petitioners submitted a copy of this Court's decision in *Kirby* as a supplement to their original brief arguing that this Court's decision in *Kirby* somehow overruled *Davis* or established a new standard for determining the nature and character of a contract. Petitioners argue that the Fifth Circuit's failure to cite *Kirby* in its decision, somehow suggests that the Fifth Circuit believes that *Kirby* is not intended for general application. Respondent suggests that the Fifth Circuit's failure to cite *Kirby* is a recognition that *Kirby* did not overrule the prior jurisprudence and that the two-step *Davis* test reading the MSA and work order together to determine if the subject matter deals with maritime activities or commerce is therefore consistent with the legal standard reaffirmed in *Kirby*.

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2. *Campbell v. Soniat Offshore Drilling, Inc.*, 979F.2d 1115 (5th Cir. 1992); *Demette v. Falcon Drilling Co., Inc.*, 280 F3d 492 (5th Cir. 1992); *Diamond Offshore Co. vs. A&B Builders, Inc.*, 302 F3d 351 (5th Cir. 2002); *Dupre v. Penrod Drilling Corp.*, 993 F.2d 474 (5th Cir. 1993); *Hoda v. Rowan Cos., Inc.*, 419 F3d 379 (5th Cir. 2005); *Hollier v. Union Tex. Petroleum Corp.*, 972 F.2d 662 (5th Cir. 1992); *Smith v. Penrod Drilling Corp.*, 960 F2d 456 (5th Cir. 1992); *Thibodaux v. Vamos*, 487 F.3d 288 (5th Cir. 2007).

The blanket contract (MSA) between Devon and Magnolia contemplates the use of vessels, and requires Magnolia maintain marine insurance coverages. It contains requirements that Magnolia comply with safety regulations of the United States Coast Guard and includes provisions for wreck removal above or below the surface of the water. Most importantly the MSA includes a choice of law clause calling for the application of the general maritime law.

The work outlined on the punch list required that Thomas and other Magnolia employees work aboard a vessel over navigable waters. Thomas was involved in cargo operations aboard the vessel and the vessel served as a work platform in execution of the items on the punch list. Reading the Devon/Magnolia MSA and punch list together, it is abundantly clear that the contract subject matter covers maritime activities and transactions.

II. The Second and Ninth Circuit's Reevaluation of their Prior Jurisprudence in Light of this Court's Decision in *Kirby* does not Constitute a Split among Circuits.

Clearly when presented with those situations where the historical jurisprudence does not provide a ready and discernible solution to the question of whether a contract is maritime or non-maritime, the courts will always have to take the next step in the analysis to determine the true nature and character of the contract. Such was the case in *Kossick* regarding an agreement by a ship owner to assume responsibility for all consequences of improper or inadequate treatment of

a seaman at a public health service hospital in consideration of his foregoing private treatment; in *Exxon Corp. v. Central Gulf Lines, Inc.*, 500 U.S. 603 (1991) applying the two-step analysis to agency contracts for marine fuel requirements; *Davis* in addressing service contracts in the offshore oil and gas industry; and most recently in *Kirby* addressing a contract for intermodal transportation of goods.

Petitioners contend that the Second Circuit's decision in *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005) and Ninth Circuit's decision in *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F. 3d 1308 (9th Cir. 2007), addressing contracts of insurance containing maritime and non-maritime elements wherein those Circuits questioned their prior jurisprudence for analyzing mixed contracts after this Court's decision in *Kirby*, somehow constitutes a split in the Circuits is a mischaracterization of the situation. The Second Circuit decision in *Folksamerica* and the Ninth Circuit decision in *Sentry Select Ins. Co.* simply recognize the applicable legal standard already adopted by the Fifth Circuit beginning with *Davis*.

The Second and Ninth Circuits had previously carved out exceptions to the old rule that admiralty jurisdiction was said to be reserved to contracts, claims, and services purely maritime. The Second Circuit derived a "threshold inquiry" wherein prior to inquiring into the subject matter of the contract, the Court first looked into the subject matter of the dispute.[3] The Second Circuit in *Folksamerica* questioned whether its

3. 413 F.3d at 312.

"threshold" test survives the holding in *Kirby* requiring that courts focus entirely on the underlying contract and not the subject matter of the dispute.[4]

Likewise, the Ninth Circuit in *Sentry Select Insurance* questioned its two exceptions regarding mixed contracts. The Ninth Circuit in prior holdings found a basis for exercising maritime jurisdiction over a contract if the non-maritime obligations were merely "incidental", or if the non-maritime obligations are substantial, the court would "sever" the maritime obligations of the contract and assert maritime jurisdiction over the severed portion.[5] Petitioners argue that the Fifth Circuit's *Davis* analysis is somehow a modified "severability" test, but they clearly ignore the Fifth Circuit's Court's mandate in *Davis*, that in order to determine whether a contract is maritime or non-maritime, one must read both the Master Service Agreement and the work orders together to determine the nature and character of the contract and whether the subject matter involves maritime activities or transactions.

---

4. *Id.* at 313.

5. 481 F.3d at 1218.

CONCLUSION

Petitioners have not established any compelling reasons for this Court to grant the Petition. Therefore, Respondent respectfully requests that the Petition be denied.

Respectfully submitted,

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No. 07-931

IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC. and
ST. PAUL SURPLUS LINES,
Petitioners,

v.

DEVON LOUISIANA CORP. and
PETRA CONSULTANTS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

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IN THE

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MAGNOLIA INDUSTRIAL FABRICATORS, INC. and
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' REPLY TO BRIEF IN OPPOSITION

Devon Louisiana Corporation's ("Devon's") Response misstates the record in this case, the decision below, the Fifth Circuit jurisprudence, and the decisions of the Second and Ninth Circuits that conflict with the Fifth Circuit jurisprudence. An accurate reading displays why the Court should grant certiorari.

1. Devon Misstates The Record

The issue presented for review is whether the test developed in *Davis & Sons, Inc. v. Gulf Oil Corp.*,

919 F.2d 313 (5th Cir. 1990) and applied below is compatible with this Court's decision in *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004) ("*Kirby*"), as interpreted by the Second and Ninth Circuits. Using *Davis & Sons*, the Fifth Circuit concluded that the contract at issue was maritime by focusing on a selected aspect of the contract, despite this Court's admonition in *Kirby* that the contract is to be considered as a whole. Devon selectively drafted its Statement of the Case to suggest that the decision may be correct on the merits, even if the Fifth Circuit's reasoning was erroneous. An accurate statement of the record, however, reveals how the *Davis & Sons* test led to an incorrect result.

Devon argues that the Master Service Agreement ("MSA") "contains provision for the use of vessels [and] requirements for marine insurance coverage." *Brief in Opposition* at 2. However, Devon omits that the MSA is a standard form contract[1] that Devon used with all its contractors, only some of whom would provide maritime services, and thus includes both maritime and non-maritime elements. For instance, while the MSA requires marine insurance, it also requires the contractor to carry Comprehensive Automobile Liability insurance, which would obviously have no application to marine operations. The insurance requirements in this "one-size-fits-all" form do not overcome the non-maritime elements that dominate this case.

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[1] This is evident from the fact that the name of Petitioner Magnolia Industrial Fabricators is typed into a blank in the contract.

Devon also points out that the MSA requires compliance with Coast Guard regulations, but this requirement is contained in a paragraph that requires the contractor to "comply with all applicable local, State and Federal safety regulations. These rules and regulations include, but are not limited to, regulations of the United States Coast Guard . . . ." *Id.* at 2. This says nothing more than that some of Devon's contractors might perform work subject to Coast Guard regulations. The reference to local and state law equally indicates that other contractors might perform wholly non-maritime work.

Devon also quotes a portion of the choice of law clause in the MSA that calls for the application of maritime law, *id.* at 2, but conveniently omits the remainder, which provides that "In the event that it is ever judicially determined that the General Maritime laws of the United States are inapplicable, then this Contract shall be governed by the laws of the State of Louisiana." Again, this provision does not suggest that the parties intended for maritime law to apply if the services provided were non-maritime in nature and thus "the General Maritime laws of the United States are inapplicable."

Devon then omits facts from its description of the work done by Petitioner to make it seem more maritime than it was. Devon describes the structure that Magnolia was hired to repair as an "offshore platform located . . . in navigable waters of the United States," *id.* at 3, but omits that the platform was firmly affixed to the seabed and thus was an "island[], albeit [an] artificial one[]." *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 360 (1969). In *Rodrigue,* this Court approved language from *Phoenix Construction Co. v. The Steamer Pough-*

keepsie, 162 F. 494, 496 (S.D.N.Y. 1908), *affirmed*, 212 U.S. 558 (1908), that work related to such structures "is not even suggestive of maritime affairs." 395 U.S. 360-61.

Devon also states that a "vessel was needed to support the repair crew [and] transport the crew to the offshore location," but omits that Magnolia did not own or operate the vessel. *Brief in Opposition* at 3. Accordingly, the work anticipated was indistinguishable from hiring a Manhattan construction crew to do work on Staten Island; the fact that the Staten Island ferry was necessary to reach the job site would not make this a maritime contract.

Devon also states that the vessel that transported the Magnolia crew to the artificial island served "as a work site for fabrication work, and all the welding and cutting operations," and that the plaintiff whose claim gives rise to this contractual indemnity dispute was injured on the vessel. *Id.* at 3. But Devon omits that both parties anticipated that *all* of the work would be done on the platform itself, and that the only reason that any work was done on the vessel was the inadvertent failure to obtain a hot work permit. Even so, the fabrication work was the only task performed on the boat, and the vast majority of the work was done solely on the platform. Had weather not cut the job short, 19 of the 21 items to be accomplished would have been done on the platform. Moreover, as will be discussed, the fact of where the plaintiff worked or was injured, while an important part of the Fifth Circuit's *Davis & Sons* test, should be irrelevant under the "conceptual" approach mandated by this Court's *Kirby* decision as interpreted by the Second and Ninth Circuits.

Accordingly, application of the *Davis & Sons* test was not merely a case of taking the wrong road but getting to the right destination; it led the Fifth Circuit to a place never envisioned by *Kirby*.

2. Devon Misstates The Decision Below

Devon attempts to clothe the decision below with respectability by describing the methodology used as a simple application of the "two-step" test for determining admiralty contract jurisdiction set forth in *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961) and reaffirmed in *Kirby*. Under that test, because "precedent and usage are helpful insofar as they exclude or include certain common types of contract," 365 U.S. at 735, the court first looks to prior jurisprudence. In the absence of controlling precedent, the court addresses "whether the transaction relates to ships and vessels, masters and mariners, as agents of commerce." *Id.* at 736. *Kossick* makes it clear that this inquiry is "conceptual," not "spatial," *id.* at 735, and *Kirby* reaffirms this.

While the court below did review prior precedent, this hindered rather than helped because the Fifth Circuit jurisprudence was tainted by *Davis & Sons*. The court principally relied upon *Campbell v. Sonat Offshore Drilling, Inc.*, 979 F.2d 1115 (5th Cir. 1991) and *Hoda v. Rowan Co.*, 419 F.3d 379 (5th Cir. 2005), both post-*Davis & Sons* decisions. Both cases involved routine oilfield operations performed on virtually every oil or gas well, whether the well is located on land or offshore. In *Campbell*, the contract called for the setting of "casing," i.e., steel pipe that is inserted in every well whether on land or offshore to

keep the walls of the well from caving in.[2] In *Hoda*, the contractor was hired to tighten bolts on the blowout preventer, a device set on top of the casing on every oil or gas well on land or offshore so that the well can be shut in if a blowout commences.[3] Casing and blowout preventers are moved into position using the drilling rig's lifting apparatus, whether the rig is located on land or over water.[4] In both cases, the well was being drilled by a "jackup" rig, an offshore drilling structure with legs that support the hull; the rig is floated onto location and then the legs are lowered to the seafloor and the hull is jacked out of the water.[5] Jackup rigs are considered vessels,[6] but in both cases the contractor did not own or operate the rig itself, but was merely called out to perform the task in question. Thus, the focus should have been on the non-maritime nature of the work to be done. However, because these routine oilfield operations required the use of a vessel's lifting apparatus, the *Campbell* and *Hoda* courts applied *Davis & Sons* and concluded the contracts were maritime in nature.

In turn, the court below noted that welding on the boat became legally necessary because a hot work permit had not been obtained, compared that situation with the use of the lifting apparatus in *Campbell* and *Hoda*, and concluded that the contract to repair

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[2] RON BAKER, A PRIMER OF OIL WELL DRILLING 82 (4th ed. 1979) (hereinafter "BAKER").

[3] BAKER at 81.

[4] BAKER at 50-56.

[5] BAKER at 87.

[6] *See, e.g., Vickers v. Chiles Drilling Co.*, 822 F.2d 535, 537 (5th Cir. 1987).

the platform was a maritime contract. The Fifth Circuit was obliged to distinguish *Domingue v. Ocean Drilling & Exploration Co.*, 923 F.2d 393 (5th Cir. 1991). There the contractor was hired to perform a wireline operation on an offshore well. This involves inserting a tool on a wireline into the well,[7] and since the well was being drilled by a jackup rig, the operation had to be performed on the vessel. However, the court concluded that this was not a maritime contract—a conclusion in tension with *Campbell* and *Hoda*.

Campbell, *Hoda*, *Domingue*, and the decision below demonstrate that *Davis & Sons* has led the Fifth Circuit far out of the mainstream of admiralty contract jurisdiction jurisprudence, and into inconsistent waters. Following this Court's decision in *Kossick*, the courts in *Campbell*, *Hoda* and *Domingue* should have asked whether conceptually a contract to set pipe in an oil well, tighten the bolts on a blowout preventer, or run a wireline tool down a well "relates to ships and vessels, masters and mariners, as agents of commerce." Had *Campbell* and *Hoda* been correctly decided, it is inconceivable that the court could have concluded that the contract involved here would have been considered maritime in nature, because minimal work was done on a vessel, and then only because of the unanticipated failure to get a hot work permit. Accordingly, the decision below can only be considered a mainstream application of the two-step *Kossick* test if following improperly reasoned decisions is "mainstream." And, of course, the decision below can scarcely be considered to apply the second part of the *Kossick* test, because instead of

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[7] BAKER at 94.

going to the core question of whether the contract in question involves maritime commerce, the court asked the *Davis & Sons* questions.

3. Devon Misstates *Davis & Sons*

Devon describes the *Davis & Sons* test as one that is "designed to determine the nature of the MSA and subsequent work order read together, focusing on the overall character of the contract," and argues that because *Davis & Sons* focuses on the "overall character" of the contract, it is thus compatible with *Kirby*. *Brief in Opposition* at 5. This statement is misleading, however, because it is clear that *Davis & Sons* does not focus on the "overall character" of the contract, but solely on isolated portions of the contract.

First, *Davis & Sons* makes it clear that no consideration is to be given to any job performed under the MSA other than the one giving rise to the claim in question:

> Davis asserts that [since] approximately 70% of the labor provided under this contract was land-based, the contract's principal obligation was demonstrably non-maritime. Even if we assume Davis's factual assessment to be correct, however, this does not foreclose the application of maritime law to the work orders applicable to some or all of the 30% vessel-based services as maritime obligations . . . .

919 F.2d at 316.

Moreover, the *Davis & Sons* test requires consideration of the following factors:

1. What does the specific work order in effect at the time of the injury provide?

2. What work did the crew assigned under the work order actually do?
3. Was the crew assigned to work aboard a vessel in navigable waters?
4. To what extent did the work being done relate to the mission of that vessel?
5. What was the principal work of the injured worker?
6. What work was the injured worker actually doing at the time of the injury?

Id.

These factors focus solely on the work done under the particular work order, not on the contract's "overall character." *Davis & Sons* focuses on "overall character" only if one looks at the "character" of the particular work order—and not even then, because the last two factors chop the work order into segments. *Davis & Sons* focuses on the work of the individual worker, who, as in this case, might have been involved in only a small fraction of the work done under that work order. Accordingly, *Davis & Sons* cannot be said to focus the inquiry on the "overall character" of the contract, even if one views the contract as the individual work order rather than the MSA. This segmented approach is irreconcilable with this Court's decision in *Kirby* as interpreted by the Second and Ninth Circuit, which requires a determination of whether the contract, in its totality, is related to maritime commerce.

4. Devon Fails To Explain How The Second And Ninth Circuit Decisions Are Not In Conflict With The Decision Below.

The primary question is whether the decision below applying the *Davis & Sons* test to determine admiralty contract jurisdiction can be reconciled with the decisions of the Second and Ninth Circuits applying *Kirby*. Interestingly, Devon's discussion of this critical issue occupies fewer than two pages of its brief.

Both *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2007) and *Sentry Select Ins. Co. v. Royal Ins. Co. of America*, 481 F.3d 1208 (9th Cir. 2007) presented the question of whether an insurance policy was a maritime contract. Both policies insured both marine and non-marine risks. By its nature, an insurance policy provides coverage over a period of time, and discrete claims will be made under the policy. In *Folksamerica*, the claim involved an injury to a worker on a barge, but involved the Comprehensive General Liability section of the policy, a non-marine insurance form. Nonetheless, the court concluded that the insurance policy as a whole was maritime in nature. In *Sentry Select*, the claim involved injury to a Jones Act seaman and involved the Maritime Employers' Liability endorsement to the policy, a marine insurance form, but the court found that the non-marine elements predominated, and that the policy was thus not maritime.

In both cases the courts could have analyzed the question in terms of whether the particular claim was maritime in nature, considering the section of the policy involved and the facts of the particular incident. Alternatively, the courts could have analyzed whether the particular section of the policy

involved in the claim was a maritime contract, without regard to the facts of the claim. Instead, *Kirby* compelled both courts to look to whether "the primary objective" of the policy as a whole was maritime commerce. Both decisions left no doubt that the result would have been the same without regard to what section of the policy was involved, and without regard to the facts giving rise to the claim.

The MSA, like the insurance policies involved in *Folksamerica* and *Sentry Select*, applies to both maritime and non-maritime work. Like an insurance policy, the MSA applies over a period of time. And like an insurance policy, each claim under the indemnity provision would involve facts unique to that claim. Contrary to the Second and Ninth Circuits, however, the Fifth Circuit apparently did not feel constrained to apply the reasoning of *Kirby* to resolve the question of whether the contract claim was governed by maritime law. Unlike the Second and Ninth Circuits, the Fifth Circuit analyzed the jurisdictional question by focusing on the facts of the particular dispute, not on whether the primary objective of the MSA as a whole was maritime commerce. And unlike the Second and Ninth Circuits, the decision below leaves no doubt that the case would have been decided differently if the facts of the particular dispute had been different. For example, if the plaintiff in this case had done all his work on the platform and had been injured on the platform, it is inconceivable that the Fifth Circuit would have concluded that maritime law applied. Devon's only explanation of why the Fifth Circuit's decision is consistent with these decisions is to claim that under *Davis & Sons*, "one must read both the Master Service Agreement and the work orders together." *Brief in Opposition* at 11. Not only would the

particular work order be irrelevant under the Second and Ninth Circuit decisions, but, as we have seen, *Davis & Sons* requires inquiry into a great deal more than just the MSA and the work order, because it also requires an inquiry into the unique facts of the claim. This is irreconcilable with the Second and Ninth Circuit interpretations of *Kirby*.

CONCLUSION

As this Court stated, *Kirby* was "a maritime case about a train wreck." 543 U.S. at 390. This is a non-maritime case where the injury just happened to occur on a boat. This Court should grant certiorari to clarify whether the *Kirby* rationale is broadly applicable to all determinations of maritime contract jurisdiction, or whether the Fifth Circuit should be allowed to continue to apply its incident-specific and therefore spatially-oriented methodology to determining whether service contracts in the offshore oil industry are subject to admiralty jurisdiction.

Respectfully submitted,

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IN THE

Supreme Court of the United States

MAGNOLIA INDUSTRIAL FABRICATORS, INC.
and ST. PAUL SURPLUS LINES,

Petitioners,

—v.—

DEVON LOUISIANA CORP. and PETRA CONSULTINGS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

AMICUS CURIAE BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES IN SUPPORT OF PETITIONER

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March 14, 2008

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The Maritime Law Association of the United States (hereinafter, "MLA") respectfully submits the following *amicus curiae* brief in support of the petition of Magnolia Industrial Fabricators, Inc. and St. Paul Surplus Lines (collectively "Magnolia") for a writ of certiorari.[1]

INTEREST OF *AMICUS CURIAE*

The MLA is a voluntary, nation-wide bar association founded in 1899, with a membership of approximately 3,100 attorneys, judges, law professors, and other distinguished members of the maritime community. Its attorney members, most of whom are specialists in maritime law, represent virtually all maritime interests—shipowners, charterers, cargo owners, port authorities, seamen, longshoremen, passengers, underwriters, financiers, and other maritime claimants and defendants.[2] This Court has

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[1] Pursuant to this Court's Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief.

Pursuant to this Court's Rule 37.2(a), *amicus curiae* states that petitioner and respondent received timely notice of the intent to file this brief and each has given written consent to the filing of this brief. Such written consent has been filed with the Clerk.

The MLA takes no position on the correctness or incorrectness of the opinion of which Petitioner seeks review. The MLA submits this brief merely to delineate the issues that it believes require this Court's decision and to argue in favor of review.

[2] The MLA has sponsored a wide range of maritime legislation and revisions thereto in its 108 years of existence,

described the MLA as "an organization of experts in admiralty law" and "an expert body of maritime lawyers . . . ."[3]

The purposes of the MLA[4] are stated in its Articles of Incorporation:

> The objectives of the Association shall be to advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation, to furnish a forum for the discussion and consideration of problems affecting the Maritime Law and its administration, to participate as a constituent member of the *Comité Maritime International* and as an affiliated organiza-

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including the Carriage of Goods by Sea Act, 46 U.S.C. §§ 1300-1315; the maritime portions of the Federal Arbitration Act, 9 U.S.C. §§ 1-16, and the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1603-1611; the Maritime Lien Acts of 1910 and 1920 and their 1988 amendments, *see* 46 U.S.C. §§ 31341-31343; the Act permitting appeals from interlocutory admiralty decrees, 28 U.S.C. § 1292(a)(3); the Public Vessels Act, 46 App. U.S.C. §§ 781-790; the Extension of Admiralty Jurisdiction Act, 46 App. U.S.C. § 740; and the Inland Rules Act, 33 U.S.C. §§ 2001-2038. *See also Merchants Bank of Mobile v. Dredge* GENERAL G.L. GILLESPIE, 663 F.2d 1338, 1350, n.17 (5th Cir. 1991)(MLA "regularly participates in national and international proceedings concerning maritime treaties and conventions").

[3] *Offshore Logistics* v. *Tallentire*, 477 U.S. 207, 223-24 (1986).

[4] Admiralty courts have recognized the MLA's general interests and concerns, including the "growing risk that fundamental principles of maritime law are presently being inadvertently eroded." *Merchants Bank*, 663 F.2d at 1349, n.17.

> tion of the American Bar Association, and to act with other associations to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

It is the MLA's policy to involve itself as *amicus curiae* only when important issues of maritime law or practice are implicated and only when the effect of the Court's decision on maritime commerce or admiralty law may be substantial.[5] The MLA is interested in this case because the issue substantially affects admiralty practice and jurisdiction, and the result of the case will impact a sizeable portion of its nationwide membership.

First, denying certiorari may affect traditional admiralty jurisdiction because the characterization of a contract as maritime or nonmaritime determines whether or not it will fall within admiralty jurisdiction.[6]

Second, denying the petition for certiorari would adversely affect uniformity of maritime law and practice. There exists a split of opinion among the Circuits as to the proper test for determining whether or not a contract is a maritime contract subject to the admiralty and mar-

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[5] *E.g.*, *Exxon Shipping Co. v. Baker*, No. 07-219 (*cert granted* Oct. 29, 2007); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *Yamaha Motor Corp., U.S.A. v. Calhoun*, 515 U.S. 1186 (1995); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 487 U.S. 358 (1990); *Offshore Logistics*, 477 U.S. 207; *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978).

[6] 28 U.S.C. § 1333; *Insurance Co. v. Dunham*, 78 U.S. (11 Wall) 1, 31-2 (1870).

itime jurisdiction of the United States courts and governed by maritime law. This Court's ruling is necessary to make the law uniform.

Third, questions of federal maritime jurisdiction by implication impact application of federal statues in the context of general maritime law.

For the foregoing reasons, the MLA's nationwide membership of attorneys, judges, law professors, and members of the maritime community have a special interest in this Court issuing a writ of certiorari to the Fifth Circuit Court of Appeal.

SUMMARY OF ARGUMENT OF *AMICUS CURIAE*

There are compelling reasons to grant Magnolia's petition for a writ of certiorari.[7] The lower court's decision involves the important issue of what type of contracts are governed by federal maritime law. The Fifth Circuit's decision below is in conflict with decisions of other United States Courts of Appeals on the same important matter.[8] The Fifth Circuit's decision does not recognize the split of authority and arguably fails to address relevant Supreme Court precedent on the issue.

The matter on which Magnolia seeks review is important[9] because it involves questions of federal jurisdiction, and by implication, construction and application of federal statutes in the context of maritime law.

[7] SUP. CT. RULE 10.

[8] SUP. CT. RULE 10(c).

[9] SUP. CT. RULE 10(a) and (c).

Lastly, the case at issue involves subject matter that should be settled by this Court.[10] Admiralty is uniquely federal[11] and national in scope.[12] Therefore, substantive as well as procedural uniformity is essential. Moreover, admiralty is predominantly judge-made law.[13] The Supreme Court therefore has a special authority and responsibility to address disputes in admiralty.[14]

ARGUMENT OF *AMICUS CURIAE*

I. PETITIONER MAGNOLIA PRESENTS AN IMPORTANT QUESTION.

The primary issue raised by Petitioner requires a determination as to when a contract is deemed "maritime" such that federal maritime law controls its interpretation. This issue arises when contracts contain both maritime and nonmaritime elements. In such cases, courts must decide if the contract will be interpreted under maritime law or some other body of law.

An important consideration in this exercise is determining whether contracts must be treated as wholly maritime or nonmaritime, or instead can be broken down into maritime and nonmaritime components so that the question of what law will govern depends of the facts of a partic-

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10 SUP. CT. RULE 10(c).

11 U.S. CONST. art. III, § 2.

12 *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874).

13 *Id.* at 576.

14 *Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20-1 & n.12 (1963).

ular case rather than the nature of the contract as a whole. As discussed in Point II *infra*, the Fifth Circuit's opinion in this case creates a Circuit split regarding the proper analysis for making this determination.

The question of whether or not a contract is maritime, at least for the purposes of a given suit, is a critical and fundamental question that must be addressed in order to determine if there is a basis for federal court jurisdiction. Thus, there should be one standard test so that both practitioners and the courts can determine with reliability and uniformity whether or not a basis for federal jurisdiction exists.

II. THERE IS A SPLIT AMONG THE CIRCUIT COURTS REGARDING BOTH THE PROPER ANALYSIS FOR DETERMINATION OF WHEN A CONTRACT IS GOVERNED BY MARITIME LAW AND THE APPLICABILITY OF THIS COURT'S DECISION IN *NORFOLK SOUTHERN* TO DIFFERENT TYPES OF CONTRACTS.

In *Norfolk Southern Railway Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14 (2004), this Court addressed questions of admiralty jurisdiction and governing law where the contract at issue had both maritime and nonmaritime elements. In analyzing whether a contract is to be considered maritime, the Court in *Norfolk Southern* adopted and applied a "conceptual" rather than "spatial" approach.[15]

According to *Norfolk Southern*, courts should not consider "whether a ship or a vessel was involved in the dispute" nor simply the place of

[15] 543 U.S. at 24.

formation and performance, when assessing the maritime status of a contract.[16] Rather, courts should consider, "the nature and character of the contract" and "whether it has reference to maritime service or maritime transactions."[17] Thus, in applying a conceptual approach, the Court should focus on "whether the principal objective of a contract is maritime commerce."[18]

The Court rejected a "spatial" approach, focusing solely on geography used by lower federal courts in determining the maritime nature of intercontinental multimodal transportation contracts, as inconsistent with the "conceptual" approach.[19] Applying the conceptual approach in that context, the Court stated that geography is only relevant if the sea components of the contract are insubstantial, in which case, it is not a maritime contract.[20]

The Court in *Norfolk Southern* acknowledged the importance of uniformity of maritime law stating that "[a]pplying state law to cases like this one would undermine the uniformity of general maritime law."[21] The Court further stated that "when a maritime contract may well have been made anywhere in the world, it should be

16 *Id.* at 23-24.

17 *Id.* at 24 (internal citations and quotations omitted).

18 *Id.* at 25.

19 *Id.* at 26-27.

20 *Id.* at 27.

21 *Id.* at 28.

judged by one law wherever it was made. Here, that one law is federal law."[22]

The Second Circuit case of *Folksamerica Reinsurance Co. v. Clean Water of New York, Inc.*, 413 F.3d 307 (2d Cir. 2005), was the first Circuit Court to look to *Norfolk Southern* for guidance in determining whether or not a mixed purpose contract was subject to federal maritime law.

Norfolk Southern involved an international multimodal bill of lading, while *Folksamerica* addressed the status of an insurance contract in the context of a claim for "ship-maintenance-related" personal injury sustained aboard an ocean going vessel.[23] Initially, the Second Circuit in *Folksamerica* applied a pre-*Norfolk Southern* analysis known as the "threshold inquiry" test.[24] The "threshold inquiry" test involves determination of "whether an issue related to maritime interests has been raised" and "whether the subject matter of the dispute is so attenuated from the business of maritime commerce that it does not implicate the concerns underlying admiralty and maritime jurisdiction."[25] The Second Circuit questioned whether or not the "threshold inquiry" test survived this Court's decision in *Norfolk Southern*, but held that the case before it

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22 *Id.* at 29 (internal citations and quotations omitted).

23 *Folksamerica*, 413 F.3d at 313.

24 *Id.*

25 *Id.* at 312 (internal citations and quotations omitted).

was sufficiently distinguishable to avoid the issue in its decision.[26]

After addressing the "threshold inquiry," the Second Circuit addressed the applicability of the "incidental" exception to the general rule that mixed contracts will not be treated as maritime contracts. The "incidental" exception "allow[ed] courts to exercise admiralty jurisdiction where the non-maritime elements of a contract [were] 'merely incidental' to the maritime ones."[27] The Second Circuit found that *Norfolk Southern* had shifted the relevant inquiry from whether the nonmaritime elements were "merely incidental," to focusing on whether the "primary objective" of the contract was maritime in nature.[28] This "conceptual" or "global" approach allowed the Court to exercise admiralty jurisdiction "over a contract with nonmaritime components deemed to be *more* than 'incidental.' "[29]

The next Circuit to address the issue of whether a contract is subject to federal maritime law was the Ninth in *Sentry Select Ins. Co. v. Royal Ins. Co. of Am.*, 481 F.3d 1208 (9th Cir. 2006). Like *Folksamerica*, *Sentry* involved a determination of whether an insurance policy was a contract governed by maritime law. The Ninth Circuit took *Norfolk Southern*'s holding one step further and found that both prior exceptions to the mixed contracts rule (the "incidental" exception addressed in *Folksamerica* and another

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[26] *Id.* at 313-14.

[27] *Id.* at 314.

[28] *Id.*

[29] *Id.* at 315 (emphasis in original).

exception known as the "severability" exception, which allowed courts to apply maritime law to severable maritime portions of a mixed contract) were undercut by *Norfolk Southern*. Thus, the Ninth Circuit instead relied on *Norfolk Southern's* "conceptual" "primary objective" test.[30]

Both the Second and Ninth Circuits appear to be following the *Norfolk Southern* analysis for application of maritime law to a mixed contract regardless of the fact that *Folksamerica* and *Sentry* involved insurance contracts, while *Norfolk Southern* involved a contract of carriage. Thus, these two Circuits view *Norfolk Southern*'s maritime jurisdiction analysis as not limited to contracts of carriage.[31]

In the case now being petitioned before the Court, *Devon Louisiana Corp. v. Petra Consultants, Inc.*, 247 Fed. Appx. 539 (5th Cir. 2007), the Fifth Circuit again addresses the issue of whether a contract is subject to federal maritime law. *Devon* involved the analysis of whether a contract to repair the fixed platform (a master service agreement) of an offshore oil rig was gov-

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[30] 481 F. 3d at 1218.

[31] While *Sentry* and *Folksamerica* contain more substantive discussions of *Norfolk Southern*'s maritime contract analysis, both the First Circuit and the Seventh Circuit also cite *Norfolk Southern* with respect to the application of maritime law to contracts other than contracts of carriage. *See also The Puerto Rico Ports Authority v. Umpirre-Solares*, 456 F.3d 220 (1st Cir. 2006)(analyzing whether a contract to remove a sunken ship from navigable waters is a maritime contract); *The St. Paul Travelers Co., Inc. v. Corn Island Shipyard, Inc.*, 495 F.3d 376 (7th Cir. 2007)(analyzing whether an insurance policy is governed by maritime law).

erned by maritime law.[32] The Fifth Circuit did not cite *Norfolk Southern* and relied instead on six factors set forth in the pre-*Norfolk Southern* case of *Davis & Sons, Inc. v. Gulf Oil Corp.*, 919 F.2d 313 (5th Cir. 1990):

> "(1) [W]hat does the specific work order in effect at the time of injury provide? (2) what work did the crew assigned under the work order actually do? (3) was the crew assigned to work aboard a vessel in navigable waters? (4) to what extent did the work being done relate to the mission of that vessel? (5) what was the principal work of the injured worker? and (6) what work was the injured worker actually doing at the time of injury? The maritime or non-maritime status of the contract ultimately depends on its 'nature and character,' not on its place of execution or performance."[33]

According to the Fifth Circuit, these factors "primarily address the nature and character of the contract as it was actually executed."[34] Review is warranted because the Fifth Circuit, probably one of the largest of the Circuits in terms of the volume of admiralty and maritime litigation, "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter[.]"[35]

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32 247 Fed. Appx. at 544.

33 *Id.* at 543-44.

34 *Id.* at 545.

35 SUP. CT. RULES Rule 10(a).

The factors applied by the Fifth Circuit are in direct conflict with the application of *Norfolk Southern* in the Second and Ninth Circuits, and to some extent, the First and Seventh Circuits.[36] The analysis in *Devon* focuses on the specifics of the incident giving rise to the particular litigation at issue rather than "conceptually" looking at the nature and character of the contract as a whole, as required by *Norfolk Southern* and followed by *Folksamerica* and *Sentry*. Further, the application of the six factors by the Fifth Circuit focusing on the particulars of a given case conflicts specifically with *Sentry*'s holding that *Norfolk Southern* eradicated the "severability" exception, as it would allow courts to apply maritime law to some incidents arising out of a contract and not others arising out of the same contract. Allowing the lower courts to determine the applicability of maritime law to contracts using different standards is antithetical to the goal of uniformity in federal maritime law.

Devon did not address the *Norfolk Southern* analysis or cite the case. The Fifth Circuit may have viewed *Norfolk Southern* as inapplicable because of the difference in the types of contracts at issue. This view, however, would be in direct conflict with the view taken of *Norfolk Southern* in *Folksamerica* and *Sentry*, which both involved insurance contracts and arose from personal injuries rather than a transportation contract as in *Norfolk Southern*.

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[36] *See* n.31.

Like *Folksamerica* and *Sentry*, the underlying incident in *Devon* involved a personal injury.[37] The *Devon* court, however, did not apply the analysis used by the Second and Ninth Circuits, which created a conflict among the Circuits even though uniformity mandates that these contracts, although different types, be analyzed by the same standard so that there can be some degree of predictability and fairness in the resolution of cases involving contracts with both maritime and nonmaritime elements. This Court should accept the pending petition in order to answer the issue in dispute, *i.e.*, whether the *Norfolk Southern* analysis for determining when contracts are governed by maritime law is limited to certain types of contracts.

III. This Case Also Implicates Issues Regarding the Application of Federal Statutes in the Context of Admiralty Jurisdiction.

In addition to the need for uniformity in the determination of whether or not a contract is sufficiently maritime so as to be within the admiralty jurisdiction and governed by general maritime law, uniformity is also necessary in the application of federal statutes, regimes, or treaties to a dispute arising under a contract.[38]

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[37] *The St. Paul Travelers Co., Inc. v. Corn Island Shipyard, Inc.*, 495 F.3d 376 (7th Cir. 2007) also arose out of a personal injury.

[38] *See e.g., Altadis USA, Inc. v. Sea Star Co.*, 458 F.3d 1288 (11th Cir. 2006); *Sompo Japan Ins. Co. of Am. V. Union Pacific RR Co.*, 456 F.3d 54 (2d Cir. 2006); *Royal Ins. Co. of Am. v. Orient Overseas Container Line Ltd.*, 514 F.3d 621 (6th Cir. 2008).

For example, Circuit Courts have already developed conflicting interpretations of *Norfolk Southern* in determining what federal body of law should apply when cargo in multimodal transport is lost or damaged on land.[39] Although that particular conflict is not at issue here, it illustrates the importance of using the same standard in determining the character of a contract in order to maintain reliable application of federal statutory law, a subject on which there is also a need for national consistency.

IV. THE MATTER SHOULD BE SETTLED BY THIS COURT.

The Supreme Court has a unique authority and responsibility to resolve admiralty disputes.[40] The Constitution singles out admiralty as a matter of national importance[41] that is uniquely within the federal government's judicial purview.[42] But with only limited exceptions,

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[39] *Altadis USA, Inc. v. Sea Star Co.*, 458 F.3d 1288 (11th Cir. 2006)(maritime contract of carriage governed by COGSA, not the Carmack Amendment); *Sompo Japan Ins. Co. of Am. v. Union Pacific RR Co.*, 456 F.3d 54 (2d Cir. 2006)(similar contract of carriage applying the Carmack Amendment rather than COGSA); *Royal Ins. Co. of Am. V. Orient Overseas Container Line Ltd.*, 514 F.3d 621 (6th Cir. 2008)(maritime contract of carriage governed by COGSA, not the Hague-Visby Rules).

[40] *Fitzgerald.*, 374 U.S. at 20-1 & n.12.

[41] U.S. CONST, art. III, § 2; *The Lottawanna*, 88 U.S. at 575.

[42] U.S. CONST. art. III, § 2. While state courts may have concurrent legal jurisdiction over some cases where admiralty jurisdiction exists, 28 U.S.C. § 1331(1), they still must

Congress has left it to the courts to define the law and practice of admiralty.[43] Therefore, admiralty tribunals below as well as the nation-wide admiralty bar seek this Court's guidance, especially on such fundamental matters as the scope of jurisdiction and definition of a maritime contract, to resolve divergences among the lower courts.

Admiralty abhors nonuniformity. It is particularly important for the Supreme Court to resolve a Circuit split since such conflicts create an undesirable uncertainty for maritime actors and the proctors who advise them. Further, the Circuit split encourages forum shopping among the Circuits.[44]

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apply federal maritime law pursuant to the "reverse-*Erie* doctrine." *Offshore Logistics*, 477 U.S. at 222-23.

[43] *The Lottawanna*, 88 U.S. at 576; Fitzgerald., 374 U.S. at 20-21 & n.12.

[44] *Silver Star Enterprises, Inc. v. SARAMACCA MV*, 82 F.3d 666, 669-70 (5th Cir. 1996)("A decision by this circuit creating a circuit split and permitting the affixation of maritime liens for bulk container lessors would spawn uncertainty, compounded by forum-shopping and extravagant lien claims").

CONCLUSION

Magnolia presents an important issue. The issue involves an undesirable conflict in the federal Circuit and District Courts that can only reasonably be resolved by this Court. Therefore, the MLA, on behalf of its membership of admiralty lawyers, judges, academics, and industry actors, respectfully urges this Court to grant Magnolia's petition for writ of certiorari.

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Respectfully submitted,

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